

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2055 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

HANSABEN WD/O. KISHOREBHAI CHHANABHAI

Versus

POLICE COMMISSIONER SURAT

Appearance:

MR JB PARDIWALA for Petitioner

MR. H.H. PATEL for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 29/11/1999

ORAL JUDGEMENT

1. The Commissioner of Police Surat City, Surat, by order dated 23.2.1999 detained the petitioner under the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short) in exercise of powers under Section 3(1) of the PASA Act. The detaining authority in the grounds of detention dated 23.2.1999 recorded that the petitioner is involved in a number of cases registered against her under the Bombay Prohibition Act. The detaining authority also considered statements of three

witnesses involving the petitioner in bootlegging activities and using force and intimidation to pursue her activities which resulted into disruption of public order. The detaining authority recorded subjective satisfaction that the three witnesses whose statements have been recorded in respect of unregistered offences were telling the truth and that the allegations made by them in their statements regarding the incidents and regarding fear expressed by the witnesses in respect of the petitioner were correct and genuine. Therefore, it was necessary not to disclose the identity of these witnesses in exercise of privilege by exercising the powers under Section 9(2) of the PASA Act. The authority also considered that recourse to other lesser alternative remedies are concerned, the alternative remedy is not possible to be resorted to for preventing the petitioner immediately from continuing his illegal and anti-social activities. The petitioner was therefore ordered to be detained under PASA Act.

2. The petitioner has challenged her detention by preferring this petition under Article 226 of the Constitution and has raised a number of contentions. Mr. Pardiwala, learned counsel for the petitioner has however restricted his arguments to the following grounds:-

- (a) The detaining authority has acted sluggishly and the action is unnecessarily delayed which has snapped live link between the alleged activities and the action of the detaining authority. Mr. Pardiwala submitted that the last offence in which the petitioner is alleged to have been involved is dated 11.10.1998. The statement of the witnesses came to be recorded on 26.1.1999 and therefore there was a delay of about 3 1/2 months during which the detaining authority has not taken any action. The action is therefore based on stale grounds. Mr. Pardiwala submitted that after the statements of the witnesses were recorded on 26.1.1999, some were verified on 22.2.1999 and therefore again there was a delay of nearly 3 weeks. Mr. Pardiwala therefore submits that there is a delay in action taken by the detaining authority and the detention would therefore be vitiated.

Mr. Pardiwala placed reliance on the decision of the Hon'ble Supreme Court in the case of Pradeep Nilkanth Paturkar Vs. Shri Ramamurthi & Ors. AIR 1994 SC 656 and the decision of the Supreme Court in the case of Anand Prakash Vs. The State

of U.P. AIR 1990 SC 516 and submitted that the order of detention may be set aside.

(b) Mr. Pardiwala submitted that the petitioner has been labelled as a bootlegger and the mere fact of her being labelled as bootlegger cannot lead to a presumption of disturbance in public order. Therefore, she could not have been detained. Mr. Pardiwala's submission is that the statement of three witnesses could not have been relied on by the detaining authority. According to Mr. Pardiwala it is nothing but a parrot like chanting of rites. The statements are got up and concocted in mechanical manner and the detaining authority has also relied on the same in a mechanical manner which the authority ought not to have done. In support of his argument Mr. Pardiwala has pressed into service the decision of this High Court in the case of Mangaji Chanduji Thakore Vs. Commissioner of Police, Ahmedabad and Others in Special Criminal Application No. 1087 of 1992 decided on 6.9.1993.

Mr. Pardiwala submitted that public order and law and order are two different concepts and some stray incidents cannot be treated as disturbance to public order. He has pressed into service the decision of a Division Bench of this Court in L.P.A. No. 1139 of 1999 in Special Civil Application No. 597 of 1999 delivered on 1.10.1999. He submitted that even the Division Bench has, after considering the legal proposition, observed that what concept of maintenance of law and order and public order are distinct. Mr. Pardiwala submitted that the Division Bench has taken into consideration all the decisions on the point and therefore in the instant case public order cannot be considered as disturbed.

(c) The third ground that is canvassed by Mr. Pardiwala is that the privilege claimed in exercise of power under Section 9(2) of the PASA Act is bad in law. He submitted that the detaining authority verified the statements of 3 witnesses on 22.2.1999 and the order of detention came to be passed on 23.2.1999. Therefore, there was no sufficient time lag to facilitate recording of subjective satisfaction by the

detaining authority. The time lag was so short that the detaining authority could not have verified and satisfied itself subjectively about the correctness and genuineness of incidents and the activities of the detenu alleged by the witnesses and the fear expressed by them qua the detenu. Therefore, the subjective satisfaction would stand vitiated. In support of his say, Mr. Pardiwala has pressed into service a decision of this High Court in the case of Kalidas C. Kahar Vs. State 1993(2) G.L.R. 1659.

3. Mr. Pardiwala assailed the subjective satisfaction of exercise of power under Section 9(2) of the PASA Act on another ground also. According to him, the detaining authority had no independent material in the nature of contemporaneous record to arrive at subjective satisfaction for exercise of powers under Section 9(2) of the PASA Act. Therefore also the order would stand vitiated. Mr. Pardiwala submitted that the detention may be quashed by allowing the petition.

4. Mr. H.H. Patel, learned A.G.P. submitted that there was no delay on the part of the detaining authority. He submitted that the last offence relates to 11.10.1998. By way of resorting alternative remedy, the detaining authority took action under Section 93 of the Bombay Prohibition Act, on 10.2.1999 and therefore time was consumed in taking such action. The delay therefore cannot be said to be so inordinate that it would render the detention illegal or vitiated. Mr. Patel pressed into service the decision in the case of Bharkumar Manilal Parekh Vs. Union of India 1992(1) G.L.H. 541 and submitted that in view of the decision in the facts of the present case, it cannot be said that there is inordinate unexplained delay on the part of the detaining authority.

4.1 As regards public order Mr. Patel submitted that as many as three witnesses have stated regarding involvement of the petitioner in bootlegging activities and her action resulting into disturbance in public order to such an extent that people in that area had started running helter-skelter and had to run into their houses and close the doors and there was an atmosphere of terror in that area. The detaining authority has recorded subjective satisfaction about the disturbance to public order and therefore the same may be considered by the court. The court may not consider whether the material was sufficient or not. Mr. Patel then pressed into

service a decision of the apex court in the case of Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat 1999(2) G.L.H. 300 and K.S. Zala Vs. State of Gujarat 1999(2) G.L.H. 415 and submitted that in view of these decisions involvement of the petitioner in bootlegging activities subjective satisfaction of the detaining authority that such activity is dangerous to public health, recording of incidents resulting into disturbance to public order, it cannot be said that the order of detention is ill-founded. Mr. Patel lastly submitted that the order of detention was passed after verifying the statements and being subjectively satisfied about the allegations in the statements. He therefore submitted that the petition may be dismissed.

5. At the outset it may be noted that the none of the respondents has filed any affidavit in reply.

6. Before proceeding to merits of the case certain relevant dates may be noted about which there is no dispute on factual aspect.

a) 5th offence registered against the petitioner relates to 11.10.1998

b) 6th and last offence registered against the petitioner relates to 6.2.1999

c) Action under Section 93 of the Bombay Prohibition Act taken on 10.1.1999

d) Statements of witnesses in respect of unregistered offences recorded on 26.1.1999

e) Statements of witnesses verified on 22.2.1999

f) Detention order passed on 23.2.1999

6.1 It has been argued by Mr. Pardiwala that there is inordinate delay on the part of the detaining authority in taking action. The action is therefore based on stale incident. To assert his arguments Mr. Pardiwala submitted that fifth offence is relatable to 11.10.1998 and the statements were recorded on 26.1.1999. Therefore, there was a gap of three and half months in taking action. As against this, an attempt is made to explain the delay by referring to the fact in the grounds of detention that the action was taken under Section 93 of the Bombay Prohibition Act on 10.1.1999 and therefore there was no delay. However, the respondents could not tender any explanation for inaction between 11.10.1998

and 10.1.1999 which is precisely three months. The detaining authority has not filed any affidavit to explain the delay. Therefore, even if what is stated in the grounds of detention as factual part as an explanation then also there is delay of three months between the 5th incident and recording of the statements.

6.2 After the statements came to be recorded on 26.1.1999, there was again a gap of about three weeks till 22.2.1999 when the statements came to be verified. Here it may be noted that the incident occurred between these two dates on 6.2.1999 when the petitioner came to be booked for a prohibition case.

6.3 The grounds of detention indicate that the detaining authority has taken into consideration all the six offences and therefore it can reasonably be expected of the detaining authority to have explained inaction for about three months between 11.10.1998 and 10.1.1999.

6.4 In this regard the decision relied on by Mr. Patel, learned AGP may first be taken into consideration. In *Bharatkumar Manilal Parekh Vs. Union of India* (supra), in the facts of the case, the Division Bench held that the delay cannot be said to be unexplained. The Bench observed that the delay in passing the detention order by itself would not vitiate the detention or would not mean that subjective satisfaction arrived at by the detaining authority was not genuine. It would depend upon the facts of each case and whether the grounds alleged against the detenu are stale or illusory or whether because of delay, the link of the petitioner in indulging in illegal activities is established or not. Relying on the decision of the Supreme Court in the case of *Rajendrakumar Vs. State of Gujarat* AIR 1988 SC 1255 the court observed that unless grounds are stale or the detenu's nexus with illegal activity is snapped, the delay in passing the order would not vitiate the detention order. The court then observed that in fact of that case delay cannot be said to have remained unexplained. In the instant case the respondents including the detaining authority have not filed affidavit. No explanation is tendered for inaction between 11.10.1998 and 10.1.1999 and thereafter between 26.1.1999 and 22.2.1999, the dates on which the statements came to be recorded and verified respectively.

6.5 As against this in *P.N. Paturkar Vs. S. Ramamurthy* AIR 1994 SC 656 the court observed that taking action of detention after about 5 months and 8 days from the date of registration of last case was bad in law

because of delay. The statements of the witnesses were recorded after the detenu was released on bail in the offence and the Supreme Court was disturbed because of this fact situation.

6.6 In Anand Prakash Vs. State of U.P. AIR 1990 SC 516 the detenu was alleged to have been involved in theft of electric wires belonging to the electricity board. It was alleged that there was a recovery of melted wire from the detenu. The detenu came to be arrested two months after the recovery and on the next date detention orders were passed. In that case no satisfactory explanation was tendered by the detaining authority for the delay and it was held that the detention was bad.

6.7 In the instant case affidavit is not filed by the detaining authority. There is no case registered between 11.10.1998 and 26.1.1999. Regarding prohibition, it is stated at the bar uniformly by both the sides that in all the six prohibition cases detenu was released on bail immediately. The fact therefore remains, that the statements came to be recorded after the detenu was released on bail in 5 prohibition cases. The authorities have not explained as to why there was total inaction even after the statements were recorded on 26.1.1999. The authority has also not taken any action on 6.2.1999 when allegedly the petitioner was involved in a prohibition case and admittedly released on bail, because by that time the authorities had with them the history of 5 prohibition cases and at least three incidents of unregistered offences and therefore inaction on the part of the detaining authority from 6.1.1999 to 22.2.1999 also is a factor which needs consideration.

6.8 In the facts and circumstances discussed above, it appears that the detaining authority has acted belatedly, the machinery is moved in a sluggish manner and in view of the decisions relied on by Mr. Pardiwala and even as per the decision relied on by Mr. Patel where there is no explanation on the part of the detaining authority about undue delay and when there is a long gap between the alleged action and the detention, the satisfaction of the detaining authority would stand vitiated.

7. Coming to the next ground regarding public order it may be noted that the grounds of detention clearly indicate that the petitioner is involved in as many as six prohibition cases. The detaining authority has considered that these activities of her are detrimental to the public health. The detaining authority has also

taken into consideration the three statements of witnesses in respect of unregistered offences. The incidents clearly indicate that on these occasions force was used against person of the witnesses and/or the people who had gathered around. As a result of this force terror had struck into the minds of people. People had started running helter-skelter. Shops started closing down and the people ran into the houses and closed doors and windows. It is also found that the witnesses were criminally intimidated.

7.1 In this regard Mr. Pardiwala had pressed into service the decision of the Division Bench of this court in L.P.A. No. 1139 of 1999 and he submitted that this cannot be considered as disturbance to public order. In the decision relied on by Mr. Pardiwala in the case of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat, the Division Bench took into the consideration the decisions of the apex court in the case of Piyush Kantilal Vs. Commissioner of Police, Ahmedabad City AIR 1989 SC 491 and T. Devaki Vs. State of Tamil Nadu, AIR 1990 SC 1086 and came to the conclusion that the statements recorded in that case did not reveal the facts which can be said to be a disturbance to public order. In this regard as against the Division Bench decision, the decision of the apex court in the case of K.S. Zala Vs. State of Gujarat (supra) may be taken into consideration. In that case the apex court took into consideration its earlier decisions in the case of Rashidmiya @ Chhava Ahmedmiya Shaikh Vs. Police Commissioner, Ahmedabad and Anr., JT 1989(2) SC 323 = 1989(2) GLH 304, Om Prakash Vs. Commissioner of Police & Ors., JT 1989 (4) SC 177, Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City & Anr., JT 1988 (4) SC 703. The apex court observed that the observations made by the court in Om Prakash Vs. Commissioner of Police (supra) and even in Piyush Kantilal Mehta Vs. Commissioner of Police (supra) are to be understood in the context of facts of those cases.

7.2 The apex court observed that in these cases the detaining authority had not recorded the satisfaction about the activity of detenu being harmful to public health whereas in the case of K.S. Zala Vs. State of Gujarat (supra) which was before the apex court, there was such an observation made by the detaining authority. Likewise, in the other cases the detaining authority had referred to some incidents of beating but there was no material to show that as a result thereof even the tempo of public life was disturbed. The apex court after considering the facts of that case i.e. the facts of

K.S. Zala Vs. State of Gujarat (supra) observed that "the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. The detaining authority has also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. The material on record clearly shows that the members of the public of those localities had to run away from there and to go inside their houses and close their doors."

7.3 The court further observed that it is also well settled that whether the material was sufficient or not is not for the court to decide by applying objective tests as it is a matter of subjective satisfaction of the detaining authority. Considering the observations made by the detaining authority in the grounds of detention the apex court said that in view of the material on record it cannot be said that the satisfaction of the District Magistrate in this behalf was not reasonable or genuine. If the facts of the present case are considered, the detaining authority has specifically observed that it is subjectively satisfied that the detenu / petitioner is involved in bootlegging and is used to act in the manner which is detrimental to public health and public order. As per these statements at the time of the incidents there was an atmosphere of terror created by the act of the petitioner, people had started running helter skelter, ran into their houses and closed their doors and windows. In this view of the matter, it cannot be said that this subjective satisfaction recorded by the detaining authority as regards the disturbance to public health / order is not genuine.

8. Coming to the last ground raised by Mr. Pardiwala, that the subjective satisfaction recorded by the detaining authority for exercise of powers under Section 9(2) of the PASA Act by claiming privilege is bad as there was no time lag between the date of verification and the date of order, sufficient enough to enable the detaining authority to verify the correctness and genuineness of the statements. It may be noted that admittedly statements were verified on 22.2.1999 and the order of detention came to be passed on 23.2.1999. In this regard the decision of the Division Bench of this court in the case of Kalidas C. Kahar Vs. State (supra) may be taken into consideration. In that case proposal was made on 16.10.1992 and the detention order was passed on 17.10.1992. The court observed that the detaining

authority must have sufficient time to examine the possibility of exercising the power under Section 9(2) of the PASA Act. In facts of that case the court observed that the proposal was made on 16.10.1992 and the detention order came to be passed on 17.10.1992 and therefore the exercise of powers under Section 9(2) was bad in law which has affected the detenu's right of making an effective representation under Article 22(5) of the Constitution of India. In the instant case, the statements were verified only on 22.2.1999 and the detention order came to be passed on 23.2.1999. Thus, there was no time lag, as was the case in the case of Kalidas Kahar (supra).

9. There is another fact which is required to be considered is that there is nothing to indicate that there was any independent contemporaneous record to satisfy the detaining authority subjectively for exercise of powers under Section 9(2) of the PASA Act. In this regard it may be noted that what was considered by the detaining authority has not been stated in the grounds of detention. All that is stated by the detaining authority is that it has verified the statements and is subjectively satisfied about the existence of fear from the detenu and therefore there is need for exercise of power under Section 9(2) of the PASA Act. This court in the case of Mohmad Sarif @ Kalio Nurmohmadsarnibapu Shaikh Vs. Commissioner of Police, Ahmedabad, 1997(1) G.L.H. 1017 has observed that in absence of affidavit or any contemporaneous record to show that the authority applied its mind, it cannot be said that there were sufficient grounds. Mere reproduction of statements in order of detention cannot be considered as sufficient for arriving at the subjective satisfaction for claiming privilege under Section 9(2). In this view of the matter, subjective satisfaction arrived at by the detaining authority in the present case suffers from the defect that the grounds of detention did not indicate what was the factor that weighed with the detaining authority nor has the detaining authority filed any affidavit stating what were the factors that satisfied him about the need for exercise of power under Section 9(2), nor there is any contemporaneous material to indicate that the authority had applied its mind. In this view of the matter, the exercise of powers under Section 9(2) would stand vitiated.

10. In view of the above discussion, the petition deserves to be allowed on grounds of delay in taking action and vitiated exercise of power under Section 9(2) of PASA Act. The petition is therefore allowed. The

order of detention No. PCB/PASA ACT/16/99 dated
23.2.1999 passed by the Police Commissioner, Surat City,
in respect of petitioner Smt. Hansaben is hereby quashed
and set aside. The petitioner be set at liberty
forthwith if not required in any other case. Rule is
made absolute. No costs.

(A.L. DAVE, J)

[pkn]